72-101

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Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-101

MARGARET LOUISE BREITWIESER and
JAMES J. BREITWIESER,

Petitioners,

v.

KMS INDUSTRIES, INC., d/b/a
ADVO SYSTEMS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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To the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your Petitioners, Margaret Louise Breitwieser and James J. Breitwieser, hereby petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit denying a civil

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remedy for violation of the child labor provisions of the Fair Labor Standards Act, 29 U.S.C.A. Section 212.

OPINIONS BELOW

The majority and minority opinions of the Court of Appeals and the denial of the motion for rehearing are not yet reported. (App. A)

The opinions of the United States District Court for the Northern District of Georgia are not reported. (App. B.)

JURISDICTION

The judgment sought to be reviewed was entered on September 21, 1972, in accordance with the opinion of the Court rendered on September 21, 1972. An order denying a timely motion for rehearing was made and entered on November 2, 1972. The statutory provision conferring on this Court jurisdiction to review the judgment is 28 U.S.C.A. Sec. 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Fair Labor Standards Act, 29 U.S.C.A. Sec. 212, creates a federal right in minors under eighteen to be free from working on hazardous jobs and whether the existence of this statutorily created right implies a remedy in damages for injury resulting from the employer's violation of the right.

2. Whether the criminal penalties established by the Act constitute a remedy for the violation of the Act.

3. Whether the existence of criminal penalties precludes an implied remedy under the Act.

4. What criteria should be used in determining whether a remedy is implied under the Act.

STATUTE AND REGULATION INVOLVED

Fair Labor Standards Act

29 U.S.C. Section 203(l)

"(l) 'Oppressive child labor' means a condition of employment under which ... any employee between the ages of sixteen and eighteen years is employed by an employer in any occupation which the Secretary of Labor shall find and by order declare to be particularly hazardous for the employment of children between such ages or detrimental to their health or well-being ..."

29 U.S.C. Section 212(c)

"(c) No employer shall employ any oppressive child labor in commerce or in the production of goods for commerce."

29 C.F.R. Section 422.7 (Hazardous Occupation Order No. 7 issued by the Secretary of Labor)

"The following occupations involved in the operation of power-driven hoisting apparatus:

"(1) Work of operating an elevator, crane derrick, hoist, or high-lift truck, except operating an unattended automatic operation passenger elevator or an electric or air-operated hoist not exceeding 1 ton capacity."

* * * * *

"The term 'high-lift truck' shall mean a power-driven industrial type of truck used for lateral transportation that is equipped with a power-operated lifting device usually in the form of a

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fork or platform capable of tiering loaded pallets or skids one above the other. Instead of a fork, or platform, the lifting device may consist of a ram, scoop, shovel, crane, revolving fork, or other attachments for handling specific loads. The term shall mean and include high-lift trucks known under such names as forklifts, fork trucks, forklift trucks, tiering trucks, or stacking trucks, but shall not mean low-lift trucks or low-lift platform trucks that are designed for the transportation of, but not the tiering of, material."

STATEMENT OF THE CASE

A sixteen-year-old boy was crushed to death when the high-lift fork-lift truck which he was operating went off the loading platform and turned over. The operation of a high-lift fork-lift truck is an operation declared by the Secretary of Labor to be particularly hazardous for employees under eighteen. The assignment of a sixteen-year-old to such work is a violation of the Fair Labor Standards Act. (29 U.S.C.A. Sections 203(1)and 212(c): 29 C.F.R. Sec. 422.7)

The complaint, as amended, brought by the petitioners, the parents of the boy, alleged an action for damages for violation of the federal right established in minors by the Fair Labor Standards Act to be free from working in hazardous occupations. The District Court ruled that the FLSA did not create a cause of action for damages resulting from such a violation.

Plaintiffs appealed on the grounds that money damages is the remedy normally available for the violation of a federally established right whether or not the statute so provides.

In affirming the decision, the Court of Appeals for the Fifth Circuit held that federal courts imply remedies only when a law creating a right provides for no remedy or for a grossly inadequate remedy and further held that the criminal penalties of the Fair Labor Standards Act constitute a remedy. Judge Wisdom, dissenting, would hold that the Act creates a right and that the existence of the right implies a remedy in damages.

The bases for federal jurisdiction in the district court as alleged in the complaint as amended were the fact that the complaint sought recovery directly under the Fair Labor Standards Act (29 U.S.C.A. Sec. 201 et seq.); general federal question jurisdiction (28 U.S.C.A. Sec. 1331); federal jurisdiction of any cause of action arising under a statute regulating interstate commerce (28 U.S.C.A. Sec. 1337) and diversity of citizenship. (The count of the complaint alleging a wrongful death action based on Georgia law, for which diversity of citizenship would have been the basis for jurisdiction, was held to be barred by the Georgia Workmen's Compensation Act, and petitioners do not seek review of this ruling. They seek review only of the holding as to the availability of a federal remedy for the violation of a federally established right. Jurisdiction of the count alleging this cause of action is based on the first three grounds set out above.)

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POINT I

DENIAL OF A CIVIL REMEDY FOR DAMAGES RESULTING FROM VIOLATION OF THE CHILD LABOR PROVISION OF THE FLSA BECAUSE THE ACT PROVIDES CRIMINAL SANCTIONS CONFLICTS WITH PREVIOUS DECISIONS OF THIS COURT AS TO THE AVAILABILITY OF CIVIL REMEDIES FOR THE VIOLATION OF FEDERALLY ESTABLISHED RIGHTS.

Beginning in 1916 with *Texas & Pacific Ry. v. Rigsby*, 241 U.S. 33, 36 S.Ct. 482, 60 L.Ed. 874, a decision under the Federal Safety Appliance Act, the decisions of this Court consistently hold that in the absence of congressional declaration to the contrary, where the violation of a statute results in damage to one of the class for whose benefit the statute was enacted, the right to recover damages is implied. These decisions have not confined implied remedies to statutes deficient in criminal sanctions as is demonstrated by cases arising under the Securities Exchange Act, which provides heavier criminal penalties (15 U.S.C.A. 78ff) than does the FLSA (29 U.S.C.A. 216). (*J.I. Case Co. v. Borak*, 1964, 377 U.S. 426, 84 S.Ct. 1555, 12 L.Ed.2d 433; *Deckert v. Independence Shares Corp.*, 1940, 311 U.S. 282, 61 S.Ct. 229, 85 L.Ed. 189).

Although the FLSA criminal penalties applicable to the child labor provisions are applicable also to the wrongful discharge provision, *Mitchell v. Robert De Mario Jewelry, Inc.*, 1960, 361 U.S. 288, 80 S.Ct. 332, 4 L.Ed.2d 323, holds that a remedy for violation of the wrongful discharge provision is implied. Although *De Mario* was an injunction proceeding, it is significant here because it expresses the view of the entire Court that an employee wrongfully discharged should be compensated

in money damages even though the Act does not specifically so provide. The majority held that he could recover in the injunction proceeding despite the proviso against the collection of underpayment of the minimum wage in this manner.

The dissent reinforced its argument that damages consisting of back pay could not be had in an injunction proceeding by stating that a wrongfully discharged employee may maintain in his own right an action at law to recover wages lost as a result of his wrongful discharge (361 U.S. at 303). One member of the majority concurred specially, expressing the opinion that the employee could recover either at law or in equity.

Despite the provision for criminal penalties in the Rivers and Habors Act, this Court held in *Wyandotte Transportation Co. v. U.S.*, 389 U.S. 191 (1967), that there was an implied cause of action for the cost of removal of a vessel negligently sunk.

The enforcement criterion is specifically rejected in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 1971, 403 U.S. 388, 397, 91 S.Ct. 1999, 29 L.Ed.2d 619, 627, where this Court said that the question was not whether the availability of money damages was necessary to enforce the Fourth Amendment but whether one injured upon violation of his Fourth Amendment rights is entitled to redress his injury through a "remedial mechanism normally available in federal courts."

Under the decisions of this Court, in the absence of an explicit congressional declaration to the contrary, money damages are available for the violation of a federally established right. The dissenting opinion of Judge Wisdom in the instant case contains a correct and simple statement of the doctrine of implied remedies as enunciated by this Court.

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POINT II

DENIAL OF A CIVIL REMEDY BECAUSE OF THE EXISTENCE OF CRIMINAL PENALTIES CONFLICTS WITH DECISIONS OF OTHER COURTS OF APPEALS'

This decision conflicts with *Fratt v. Robinson*, 1953, 203 F.2d 627, in which the Ninth Circuit Court of Appeals held that there was an implied remedy for damages for violation of the Securities Exchange Act of 1934, and also with *Burke v. Compania Mexicana de Aviacion*, 9 Cir., 433 F.2d 1031, and with *Dann v. Studebaker Packard Corp.*, 6 Cir., 288 F.2d 201.

It conflicts with the leading decisions on implied remedies, which are decisions of the Second Circuit. Judge Learned Hand in *Reitmeister v. Reitmeister*, 1947, 162 F.2d 691, stated that although the Communications Act of 1934 (47 U.S.C.A. Sec. 151 et seq.) did not expressly create any civil liability, it came "within the doctrine which, in the absence of contrary implications, construes a criminal statute, enacted for the protection of a specified class, as creating a civil right in members of the class, although the only express sanctions are criminal." (The maximum sentence provided (47 U.S.C.A. Sec. 501) is longer than that provided by the FLSA.)

By the same reasoning a civil remedy was found, despite the provisions for criminal sanctions, to exist under the Federal Aviation Act in *Fitzgerald v. Pan American World Airways, Inc.*, 1956, 229 F.2d 499, and under the Rivers and Harbors Act in *United States v. Perma Paving Co.*, 1964, 332 F.2d 754. The Court (p. 758) saw no basis for thinking that the imposition of criminal penalties indicated a Congressional desire to withhold a remedy.

POINT III

WHETHER OR NOT A PRIVATE CIVIL REMEDY IS AVAILABLE FOR VIOLATION OF FLSA RIGHTS OTHER THAN MINIMUM WAGES AND OVERTIME COMPENSATION IS A SUBSTANTIAL FEDERAL QUESTION NOT HERETOFORE DETERMINED BY THIS COURT.

Whether the child labor provisions of the Fair Labor Standards Act create a private cause of action for damages resulting from their violation is a question of first impression. Should the decision below be allowed to stand, enforcement of the Act is weakened in two ways. The child labor provisions are left to be enforced by inspection by the Department of Labor only. Unlike the underpaid employee who has an incentive to file a complaint to collect any underpayment of the minimum wage, the sixteen year old assigned to a dangerous job is not likely to complain.

Furthermore, the decision weakens the statutory scheme for enforcing wage-hour provisions by raising doubt as to whether an employee discharged for filing a complaint or testifying under the Act has a private cause of action for wages lost because of his unlawful discharge. Partially on the basis of *Mitchell v. Robert De Mario Jewelry, Inc.*, 1960, 361 U.S. 288, a district court held in *Fagot v. Flintkote Co.*, USDC ED La., 1969, 305 F. Supp. 407, that such a remedy does exist. Now even this is in doubt.

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POINT IV

THIS COURT SHOULD GRANT REVIEW TO DEFINE THE CRITERIA FOR DETERMINING WHEN A REMEDY IS IMPLIED.

Judge Wisdom stated in his dissent that under the majority view there could never be a private right of action in the absence of specific statutory language. Statutes defining illegal conduct customarily provide penalties, and to hold that a remedy is not implied if there are penal provisions is in effect to abolish implied remedies.

The underlying reason for the decision may have been the employer-appellee's argument that granting a remedy in this case would lead to a flood of actions for violations of the Occupational Safety and Health Act, 29 U.S.C.A. Sec. 651 et seq. The majority was reluctant to create a remedy in a field "that has been traditionally left to the states." Thus, absent criteria for determining the circumstances under which remedies are implied, courts are left to make value judgments as to the use of judicial resources.

This Court may wish to consider either the criteria set out in "Note, Implying Civil Remedies from Federal Regulatory Statutes," 77 Harv. L. Rev. 285 (1963), or those applied to the FLSA in *Fagot v. Flintkote Co.*, 1969, 305 F. Supp. 407, 413; namely, whether a private civil remedy would be in keeping with the statutory policy and scheme. The policy criterion was easily met since the FLSA was obviously intended to make the abolition of oppressive working conditions a federal matter. A private remedy was in keeping with the statutory scheme also since the Act bestows rights on employees and specifically provides that suits for collec-

tion of underpayment of minimum wages or overtime may be filed either by the Secretary of Labor or by employees. The same criteria would eliminate the possibility of a suit for damages under the Occupational Safety and Health Act since it was not the purpose of this Act, which also sets up a commission to study workmen's compensation, to remove job injuries to federal court, and since the statutory scheme of this act leaves enforcement entirely under the control of the Secretary of Labor.

The doctrine of implied remedies has stood the test of time, and courts should not unduly circumscribe their power by adopting ill-considered limitations. Clarification of the doctrine is needed.

CONCLUSION

This Court should grant certiorari, and the judgment below should be reversed.

Respectfully submitted,

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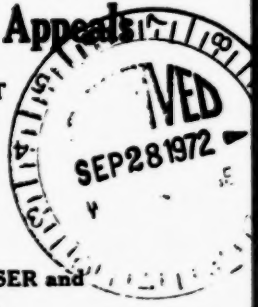
APPENDIX A

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT



No. 71-3422

MARGARET LOUISE BREITWIESER and
JAMES J. BREITWIESER,
Plaintiffs-Appellants,

versus

KMS INDUSTRIES, INC. d/b/a ADVO SYSTEMS,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Georgia

(September 21, 1972)

Before WISDOM, THORNBERRY and GODBOLD, Circuit Judges.

THORNBERRY, Circuit Judge: The issue in this case is whether the child labor provisions of the Fair Labor Standards Act, 29 U.S.C.A. §212, and the regulations promulgated pursuant thereto, create a private cause of action for damages for wrongful death. This is apparently a question of first impression.

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Appellants are the parents of a sixteen-year-old boy who died when the forklift truck he was driving, while allegedly in the scope of his employment with appellee, turned over. In Order No. 7, 29 C.F.R. §422.7, issued on the authority of 29 U.S.C.A. §203(1), the Secretary of Labor declared the operation of a high lift forklift truck to be an occupation "particularly hazardous" for employees under the age of eighteen years old. The decedent's assignment to the forklift was thus in violation of the Act.

This diversity case was originally brought in the court below as a wrongful death action based on Georgia law. The complaint was later amended to allege the FLSA as a separate basis for liability. The district court ruled on a motion to dismiss that the FLSA did not create an independent cause of action for wrongful death. He grounded his decision on statutory construction, concluding that since the FLSA establishes civil remedies for certain violations but only criminal sanctions for child labor violations, Congress must not have intended private damage suits to be an available remedy under the child labor section of the Act. Subsequently, the court held on a motion for summary judgment that appellants' wrongful death claim was barred by Georgia workmen's compensation law, GA. CODE ANN. §114-103. This appeal followed.

Appellants argue first that they have a right to damages based on the alleged FLSA violation and secondly that their state law wrongful death claim is not precluded by the Georgia workmen's compensation stat-

ute. The second contention is without merit but the first requires comment.

Appellants concede that the FLSA does not provide on its face for damages as a remedy in child labor cases. Instead they rest their case on the oft-stated principle that when there is a right there is a remedy, *See Bell v. Hood*, 327 U.S. 678 (1946). They argue that (1) the FLSA establishes the right of sixteen year olds not to be assigned to certain hazardous work, (2) that right has been violated, and (3) the Act does not provide a remedy; therefore, they conclude, the federal courts should fashion a remedy in the form of monetary damages.

This theory of recovery has a serious flaw, namely that the FLSA *does* establish a remedy for contravention of its child labor provisions. Although federal courts have on occasion implied remedies for infringement of federally conferred rights, *e.g., Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971); *J. I. Case Company v. Borak*, 377 U.S. 426 (1964); *Gomez v. Florida State Employment Service*, 5th Cir. 1969, 417 F.2d 569, they have done so only when the law creating the right provided for no remedy or for a grossly inadequate remedy. The courts have thus implied relief when necessary to prevent abrogation of congressional policies. The instant case presents a very different situation in that the FLSA, rather than lacking in remedies or providing inadequate remedies, contains a comprehensive enforcement scheme, 29 U.S.C.A. §§215-217, including

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substantial criminal penalties for violations of child labor law.

Appellants rely primarily on the three cases cited, *supra*. In *J. I. Case Company v. Borak*, 377 U.S. 426 (1964), the Supreme Court was faced with an alleged violation of §14(a) of the Securities Exchange Act of 1934. §27 of the Act gave the federal courts jurisdiction over violations but did not specify what relief might be granted. The Court held that §27 was an adequate basis for a suit for damages. *J. I. Case*, although ostensibly a statutory construction decision, is a case in which the Court implied a remedy when none was specifically provided by the statute. However, whether we denominate *J. I. Case* a statutory construction case or an implied remedy case, it is distinguishable from the cause before us. First, the FLSA simply cannot be construed to create a private cause of action for damages in a child labor case. Secondly, taking the implied remedy tack, we note that the Securities Exchange Act and its legislative history indicated a strong congressional policy against stock fraud. The Act set out, however, no specific remedy for achieving this congressional goal. The Court was thus faced with the choice of fashioning a remedy or risking nullification of congressional intent.

> We, therefore, believe that under the circumstances here it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose.

J. I. Case, supra, at 433. In contrast, in the instant case we do not need to leap into the legislative breach to preserve congressional goals because there is no breach. Congress has provided remedies of its own in the FLSA.

The second case that appellants urge in support of their position is *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). The plaintiff in *Bivens* was the victim of an allegedly illegal search by federal agents. The Court held that he could sue the agents for damages. The fourth amendment, on which the suit was grounded, does not, of course, set out any specific remedies for violations. Moreover, the court-developed remedy of suppression of evidence is useless to an innocent person. *Bivens* thus presented a clear case of a federal right without a federal remedy. The issue was whether the plaintiff should be relegated to a tort suit based on state law. The Court held he was not, concluding that when federal law creates a right there should be a federal remedy. In the instant case there is a federal remedy for infringement of the federal right; it is set out in the statute itself.

Appellant's third case is *Gomez v. Florida State Employment Service*, 5th Cir. 1969, 417 F.2d 569. In *Gomez* the employers of migratory workers and certain state officials had allegedly violated the Wagner-Peyser National Employment System Act. The workers alleged they had been paid inadequately and subjected to abominable living conditions. The only sanction set forth in the Act was a cut off of federal grants to the states

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for programs under the Act. The court decided that this remedy was inadequate and held that the workers were entitled to additional relief under the Act.

The three cases relied on by appellants involve violations of federal rights where the remedy provided by the law creating the right was unclear, *J. I. Case*, nonexistent, *Bivens*, or grossly inadequate, *Gomez*. The courts were thus faced with federal policies that were likely to be undermined if the court did not provide effective relief to the complainant. The instant case is distinguishable. First, we do not have a statutory construction problem such as existed in *J. I. Case*. The FLSA clearly does not provide for damages in child labor cases. Secondly, we do not have a right without a remedy as in *Bivens* or with an inadequate remedy as in *Gomez*. The FLSA explicitly provides for criminal penalties of up to six months in prison and a $10.000 fine for child labor violations, 29 U.S.C.A. §216. Thirdly, the one thread that runs through the three cases discussed is absent here: Congress' determination that sixteen year olds shall not be assigned to forklifts will not be subverted if we fail to read a civil damages remedy into the Act. The criminal sanctions found in the Act are substantial enough to serve as an adequate deterrent to violations of the Act's child labor provisions.

The Supreme Court said in *Bivens* that the existence of a state remedy for violation of a federal right does not preclude a federal court from fashioning a federal remedy to ensure the enjoyment of that right. However, in *Bivens* the question was whether state relief

should be the *exclusive* recourse since the fourth amendment, which was the basis of the suit, provided no remedy. The Court decided that it should not be and decreed federal relief.

The question in the case before us is different. We must decide here whether we should imply an *additional* federal remedy although a substantial one already exists. We are asked to order civil damages since the FLSA provides only criminal penalties that offer no solace to the injured party. We believe that in this situation, where Congress has provided a remedy but we are urged to formulate a more extensive one, it is appropriate to look, as the district court did, to appellants' remedies under state law to determine if additional federal relief is necessary to implement Congress' intent in enacting the child labor law.

We conclude that further relief is not called for. Although Georgia workmen's compensation law provides low awards to the beneficiaries of deceased workers without dependents — $750 in this case — the State does provide relief. We conclude that the size of the state award does not justify a federal court's creating a new federal remedy based on a statute that gives no hint of such a remedy in a field — job-related injuries to employees — that has traditionally been left to the states.

In summary, we can find no indication that Congress intended the FLSA, which was passed to deter oppressive child labor and contains substantial enforcement provisions, to form the basis for an expansion of state

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wrongful death liability. *See Rogers v. Ray Gardner Flying Service*, 5th Cir. 1970, 435 F.2d 1389. Moreover, we do not believe policy considerations call for this Court to extend FLSA remedies to include private suits for damages. In *Bivens, supra*, Justice Harlan said

> [I]n suits for damages based on violations of federal statutes lacking any express authorization of a damage remedy, this Court has authorized such relief where, in its view, damages are necessary to effectuate the congressional policy underpinning the substantive provisions of the statute.

Bivens, supra, at 402 (Harlan J. concurring). This is not such a case.

AFFIRMED

WISDOM, Circuit Judge, dissenting:

I respectfully dissent.

I would hold that the Fair Labor Standards Act created a federal right in minors to be free from working in hazardous employment tasks. The existence of this statutorily created right implies a remedy in damages for the individual who is injured by his employer's violation of the right.

The majority find "a serious flaw" in the plaintiff's theory of recovery in that "the FLSA *does* establish a remedy for contravention of its child labor provi-

sion". (Original emphasis). This case differs, therefore, the Court contends, from cases involving federal regulatory statutes which provide no remedy. The remedy here, according to the majority, is "a comprehensive enforcement scheme, 29 U.S.C.A. §§ 215-217, including substantial criminal penalties for violation of child labor law".

I have conceptual difficulties in thinking of criminal sanctions as remedial. Assuming, however, that they are remedial in terms of inhibiting future violations of the child labor provisions of the law, the enforcement scheme is society's remedy; it is not the victim's. A fine and prison sentence imposed on the offender put no money in the bank to compensate the minor for his injury or his family for his death. The individual minor's right to work under safe conditions has been violated by the employer's breach of a statutory duty owed to the minor as well as to society. If the majority's view were sound, in the absence of specific statutory language authorizing a suit for damages there could never be a private right of action for conduct newly defined by federal law as a public wrong.

We know however that in numerous situations courts have inferred civil liability from violation of a statute or regulation that is silent as to civil liability. See *Gomez v. Florida State Employment Service*, 5 Cir. 1969, 417 F.2d 569, 576; Note, Implying Civil Remedies From Federal Regulatory Statutes, 77 Harv. L. Rev. 285 (1963). The most conspicuous examples are private actions for violation of the federal securities law. Section 10(b) of the Securities Exchange Act of 1934 and

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Rule 10b-5 only prohibit certain conduct; they do not provide compensation for the parties injured by the violations or recognize a standing to sue for recovery of damages. Yet the courts are clogged with private actions based on § 10(b); the courts' problem now is how to devise reasonable limits on the implied right to hold offenders civilly liable. See *Birnbaum v. Newport Steel Corp.*, 2 Cir. 1952, 193 F.2d 461. See also *Herpich v. Wallace*, 5 Cir. 1970, 430 F.2d 792, 794.

As Chief Judge Brown pointed out in *Gomez v. Florida State Employment Service*, 5 Cir. 1969, 417 F.2d 569, 576, the "implication of a private civil remedy was first recognized by the Supreme Court in 1916 in *Texas & Pacific Ry. v. Rigsby*, 241 U.S. 33, 36 S.Ct. 482, 60 L.Ed. 874, where the Court held that an employee could recover damages under the Federal Safety Appliance Act."[1] In *Rigsby* the Supreme Court declared: "[D]isregard of the command of the statute is a wrongful act, and where it results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover damages from the party in default is implied ..." This doctrine has been applied to many regulatory statutes "and is invoked with increasing frequency, in the federal courts". Note, Implying Civil Remedies from Federal Regulatory Statutes, 77 Harv. L. Rev. 285 (1963).

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[1]The FSAA is no longer held to provide a basis for an implied cause of action. *See* Jacobson v. New York, N. H. & H. RR., 1 Cir. 1953, 206 F.2d 153, aff'd per curiam 347 U.S. 909 (1954); Moore v. Chesapeake & O. Ry., 1934, 291 U.S. 205, S.Ct. L.Ed. . But the safety requirements of the FSLA set the standard of care owed to interstate railway employees under the FELA.

A considerable portion of the majority opinion is devoted to attempting to distinguish three leading cases which support the plaintiff's theory of recovery. These cases are *J. I. Case Company v. Borak*, 1964, 377 U.S. 426, 84 S.Ct. 1555, 12 L.Ed.2d 433; *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 1971, 403 U.S. 308, 91 S.Ct. 1999, 29 L.Ed.2d 619; and *Gomez v. Florida State Employment Service*, 5 Cir. 1969, 417 F.2d 569. The majority's effort to distinguish these cases falls short of its goal.

(1) *J. I. Case*. First, the Court declares that "FLSA simply cannot be construed to create a private cause of action". This statement suggests that the Securities Exchange Act can be construed to create a private cause of action. But although private remedies are expressly provided for in certain sections of the Act (e.g. §§ 9(e), 16(b), and 18(a)), there is no language that can be said to provide a private remedy under §§ 10 (b) and 14. Second, the Court argues that the Securities Exchange Act is based on a strong congressional policy against stock frauds. This, however, is matched by the equally strong congressional policy against the improper use of child labor. On any scale of social values the interests of working minors rank at least as high as the interests of stockholders defrauded by misleading proxies. *Cf. Bivens*, 403 U.S. at 410. Third, as for the "remedy", Congress provided as comprehensive a scheme of sanctions for violations of the Securities Exchange Act, including substantial criminal penalties, as it did under FLSA. 15 U.S.C. 78ff.

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(2) *Bivens.* The majority attempts to distinguish *Bivens* by reasserting the theory that, unlike the FLSA, which has a remedy (a comprehensive scheme of enforcement), the Fourth Amendment has no specific remedy for its violation. The Court overlooks the fact, however, that there are criminal penalties for violation of the Fourth Amendment, 18 U.S.C. § 2236 (1970), and that the exclusionary rule, barring the use of evidence unconstitutionally seized is an effective remedy to a defendant in any criminal prosecution.[2]

(3) *Gomez. Gomez* is troublesome to the majority. In that case, this Court concluded that cutting off federal grants to the states for programs under the Wagner-Peyser National Employment System Act was an inadequate remedy for those who suffered from the loss — the workers. That is similar to the situation we have here. Criminal sanctions against an employer for violation committed in the past or injunctions against violations in the future offer no remedy to the minor who has suffered the injury from the employer's misconduct.

Initially the Court took the broad view that there is no implied civil remedy under the FLSA because the Act provides a comprehensive enforcement scheme including criminal sanctions. In attempting to

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[2]For a discussion of *Bivens* in the context of the power to infer remedies directly from the constitution without benefit of express congressional authority to bring a civil action see Dellinger, Of Rights and Remedies: The Constitution as a Sword, 85 Harv. L. Rev. 1533 (1972).

distinguish *J. I. Case, Bivens* and *Gomez* the Court apparently retreated to the more tenable position that in these cases the enforcement measures were inadequate. Undoubtedly they were. I ask, inadequate to whom? It seems to me that, absent the civil liability of the offender, the SEC Act, the Fourth Amendment, the Wagner-Peyser National Employment System Act, and the FLSA are all inadequate for the individual whose rights under any of those laws are violated by the offender's breach of duty.

In *Herpich v. Wallace* this Court said, citing *J. I. Case v. Borak:* "The SEC deems itself unequipped to make persons whole who have been injured by violations of Rule 10b-5; it seeks only to deter violators of the rule by making violations unprofitable . . . . Moreover, the Commission has neither the manpower nor the time that completely effectively enforcement of the securities laws by it alone would require. Consequently private action violative of the rule serve as "a necessary supplement to commission action. *J. I. Case Co. v. Borak*, 377 U. S. 426, 432." Similarly, in *Gomez* this Court recognized that to achieve "the purpose of the regulations — the protection of migratory farm workers" — it was necessary or appropriate to allow a "private civil remedy ... to individuals, acting as a private Attorney General". 417 F.2d at 576.

This is an acceptable rationale for implication of a civil remedy fom a federal regulatory statute. But the same arguments for allowing private actions under the SEC Act or the Warner-Peyser Act would allow private actions under the FLSA in the interest of work-

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ing minors. The Secretary of Labor has no way of making whole a minor who is injured as a result of being assigned to a hazardous task beyond his competency to perform. Nor does the Labor Department have the manpower or the time that complete enforcement of the law by it alone would require. Consequently civil suits for violations of the FLSA serve as a necessary or appropriate supplement in the nature of an action by a private attorney general to effectuate congressional policy in favor of protecting child labor from an employer's abuses.

I would take a simple approach to this case, one that need not rely on the fiction that the plaintiff is a private attorney general. The effect of the Act is to impose on employers the duty of assigning minors only to non-hazardous tasks. Correlatively, working minors have a right to be free from assignment to hazardous tasks. An employer's violation of his statutory duty imposes civil liability in this as in any other case where the violation of a duty causes injury to an individual to whom the duty is owed. For every right there is a remedy. If the right is created by a federal statute, the federal courts have the power to fashion an appropriate remedy. As Mr. Justice Black said in *Bell v. Hood*, , 327 U.S. at 694, a statement Mr. Justice Brennan quoted for the majority in *Bivens:* "where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief".

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 71-3422

MARGARET LOUISE BREITWIESER and
JAMES J. BREITWIESER,
Plaintiffs-Appellants,

versus

KMS INDUSTRIES, INC. d/b/a ADVO SYSTEMS,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Georgia

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion Sept. 21, 1972, 5 Cir., 197__, ____ F.2d ____).

(November 2, 1972)

Before WISDOM, THORNBERRY and GODBOLD, Circuit Judges.

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that

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the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

WISDOM, Circuit Judge, dissents from the petition for rehearing.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MARGARET LOUISE BREITWIESER and JAMES J. BREITWIESER	)	
v.	)	Civil Action
KMS INDUSTRIES, INC. d/b/a ADVO SYSTEM	)	File No. 14153

ORDER

The plaintiffs initiated this action to recover for the wrongful death of their son Larry D. Breitwieser, age 16. Plaintiffs named as defendants KMS Industries, Inc. (hereinafter KMS), a Delaware corporation, and its General Manager in Atlanta, Fred Forkers, a Georgia resident. In response, the defendants filed a motion to dismiss the Complaint alleging the following grounds for dismissal: (1) this Court's lack of jurisdiction; (2) failure of the Complaint to state a cause of action; (3) failure of the Complaint to state a cause of action not barred by the provisions of the Workmen's Compensation laws of Georgia.

After the filing of the defendant's motion, the plaintiffs filed an amendment to their Complaint striking the individual defendant Forkers. Subsequently, the plaintiffs filed a second amendment further setting out their claim. In their second amended Complaint, the plaintiffs contended that KMS had violated the Fair Labor Standards Act by negligently allowing a child sixteen years of age to

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perform duties declared to be hazardous for persons under the age of eighteen. They therefore sought to set forth a separate cause of action arising under the Fair Labor Standards Act.

In an Order denying the defendant's motion for dismissal, this Court held that: (1) it had jurisdiction over the matter; (2) the Complaint was sufficient to state a cause of action; and (3) the Complaint did not appear on its face to be barred by the provisions of the Workmen's Compensation Law of the State of Georgia. This Court also determined that the plaintiffs' second amendment merely clarified their claim of negligence rather than presenting a claim based on a right created by the Fair Labor Standards Act.

The plaintiffs now move this Court to reconsider that part of its earlier Order which held that their second amended Complaint only clarified their claim of negligence. This motion is based on the plaintiffs' contention that the Fair Labor Standards Act creates a federally enforceable right and remedy for violation of that Act.

Also before this Court, is a motion by the defendant KMS for summary judgment in its favor. Defendant contends that the wrongful death action is barred by the provisions of the Georgia Workmen's Compensation Act, Ga. Code Ann. § 114-103. The defendant further claims that if the Court refuses to reconsider its earlier Order denying the existence of a separate right of action under the Fair Labor Standards Act, no genuine issue as to any material fact exists, and therefore, that summary judgment should be granted in its favor.

MOTION TO RECONSIDER

The Court has studied carefully the provisions of the Fair Labor Standards Act to determine if a private civil remedy exists for a violation of the type alleged by these plaintiffs. The Act as a whole deals with wage and hour regulation as well as with the regulation of child labor. Explicit remedies are set out in sections 216 and 217 of the Act. The latter section provides injunctive relief to restrain the violation of the wage and hour provisions. Section 216 provides a civil remedy for minimum wage and hour violations but sets out only criminal sanctions for violations of the oppressive child labor provisions. It is into this gap that the plaintiffs wish the Court to place a civil remedy. The Court is of the opinion that the express authorization of both a civil and criminal remedy for any wage and hour violation with no mention of a corresponding civil remedy for a child labor violation strongly suggests that the Congress did not intend for a civil remedy to exist in that area. Had the Congress intended that such a remedy exist, it would have so provided.

In making this decision, the Court takes note of the fact that an adequate remedy at state law exists in most states to provide for child labor violations which result in the death of the child. That remedy is in the form of state wrongful death actions and/or Workmen's Compensation claims. This Court feels that the existence of these state remedies further suggests that no federal remedy should be implied.

For these reasons, this Court upholds its earlier decision whereby it held that the plaintiffs' allegation of a Fair Labor Standards Act violation is merely evidentiary, going only to the weight of the proof in deter-

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mining whether there was negligence or not. No private civil remedy will be implied by this Court for a violation of the oppressive child labor provisions of the Fair Labor Standards Act. Therefore, the plaintiffs' motion for reconsideration is hereby DENIED and Count II is dismissed.

MOTION FOR SUMMARY JUDGMENT

The defendant moves this Court to dismiss the plaintiffs' wrongful death claim (Count I) on the grounds that plaintiffs' action is barred by Georgia's Workmen's Compensation Law § 114-103 Ga. Code Ann. That law provides that the rights and remedies granted an employee under the Workmen's Compensation Act "shall exclude all other rights and remedies of such employee, his personal representative, parents, dependents or next of kin at common law or otherwise, on account of such injury, loss of service or death." Section 114-103 Ga. Code Ann. Minors "even though working in violation of any child labor law or other similar statute," are to be included in the term "employee" as used in this Act. See § 114-101 Ga. Code Ann. The defendant has submitted the affidavit of the Production Manager of the Atlanta Branch of ADVO Systems, Division of KMS Industries, Inc., to show that the defendant was an "employer" within the meaning of the Act and that Larry D. Breitwieser was, at the time of his death, an "employee" within the meaning of the Act, and that none of the exclusions of the Act operated to remove this case from the effect of § 114-103 Ga. Code Ann.

The defendant is correct in pointing out that the Georgia Workmen's Compensation Statute provides for alternative remedies. One may not seek to recover under both the Georgia Workmen's Compensation Statute and the Georgia Wrongful Death provisions. It is not a matter

for this Court to determine the merits of this statutory system but only to follow it as it is set out. Therefore, since the instant situation appears to be covered by the Workmen's Compensation Statute, plaintiffs' wrongful death action is precluded by that statute. For this reason, the defendant's motion for summary judgment is hereby GRANTED.

IT IS SO ORDERED this 29th day of September, 1971.

/s/ William C. O'Kelley
WILLIAM C. O'KELLEY
United States District Judge

ORDER ON MOTION TO DISMISS

The plaintiffs, mother and father of Larry D. Breitwieser, age 16, bring this action for the wrongful death of their son. The action was brought against the corporate defendant, a Delaware corporation, and its General Manager in Atlanta, an individual resident of the state of Georgia.

The defendants filed a motion to dismiss on the grounds that (1) the court lacks jurisdiction, (2) the complaint fails to state a cause of action, (3) the complaint shows on its face that it is barred by the provisions of the Workman's Compensation Laws of Georgia.

Following the filing of that motion, the plaintiff filed an amendment striking the individual defendant. Subsequent to that time the plaintiff filed a second amendment elucidating on the claims of negligence. The plaintiff claims that the employer was negligent by allowing a child of 16 years of age to perform duties

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declared by the Secretary of Labor to be hazardous for persons below 18 years of age and thus constituting oppressive child labor.

Dealing first with the question of jurisdiction of this court wherein the defendant argues that the complaint does not present a federal question since it is clear that the plaintiffs are attempting to set out a claim under the Georgia Wrongful Death Statute. We are of the opinion that the case of *Suggs v. Brotherhood of Locomotive Firemen, etc.*, 217 F. Supp. 770 (D.C., Ga., 1960), correctly outlined the law in this regard when it held:

> "In order for this Court to have jurisdiction of this action, it must be an action 'arising under any Act of Congress' (28 U.S.C. §1337) or one which 'arises under the Constitution, laws or treaties of the United States.' 28 U.S.C. §1331.... The test as above indicated is whether the matter in controversy, the civil action or proceeding, 'arises under' the Constitution, laws or treaties of the United States. Language used frequently and imprecisely by courts and lawyers would, at first blush, incorrectly indicate an equation of that test with whether the action involves a federal question."

The Court further stated:

> "Many cases involve federal questions, however, without having federal law as the basis of the suit. Not every question of federal law emerging in a suit is proof that a federal law is the basis of the suit. *Gully v. First National Bank*, 299 U.S. 109, 115, 57 S.Ct. 96, 99, 81 L.Ed. 70, 73 (1936)."

This case involves the Fair Labor Standards Act (29 U.S.C. §201, *et seq.*) and Order No. 7 issued by the Secretary of Labor pursuant to that section. However, that Act does not create a cause of action for wrongful death, conversely, it is controlled by the law of Georgia.

"A case arises under the Constitution or laws of the United States whenever its correct decision depends upon the construction of either or when the title or rights set up by the party may be defeated or sustained by a particular construction of the Constitution or law." Citing *Gully, supra. Fountain v. New Orleans Public Service, Inc.*, 387 F.2d 343 (C.A., 5th Cir., 1967).

The statute and order are alleged to be the basis of jurisdiction, but they are merely evidentiary and go to the weight of the proof in determining whether there was negligence or not. The complaint does not allege a requirement for interpretation or construction of the statute in question; it *prima facie* is one alleging negligence. Violation of the statute or order would be merely evidentiary.

The defendant has further argued that there was not a complete diversity of citizenship inasmuch as the individually-named defendant was a resident of the state of Georgia. Plaintiff's first amendment having been allowed without any objection having been made, this jurisdictional question is cured. See Moore's Federal Practice, Vol. 3 ¶15.15[3], wherein Professor Moore states in part as follows:

> "An amendment which changes the jurisdictional basis of an action will also relate back, the factual situation alleged otherwise remaining unaltered. Even though parties must be dropped to perfect diversity jurisdiction, if they were not indispensable parties the amendment will relate back to allow for entry of judgment on the original verdict where this is not prejudicial to the remaining parties. Similarly, although there may not be complete diversity when the action is brought, filing the complaint tolls the statute of limitations and an amendment dropping

non-indispensable parties to cure the jurisdictional defect will relate back. In allowing relation back in these situations, courts have emphasized the lack of prejudice to the remaining defendants."

Secondly, dealing with the defendant's contention that the complaint does not state a cause of action, it is sufficient here to state that the plaintiff has alleged more than is necessary to comply with the requirements of notice pleading.

Thirdly, the defendant has contended that the complaint shows on its face that it is barred by the provisions of the Workman's Compensation Law of the State of Georgia. A review of the pleadings do not reflect any allegations concerning the number of employees of the defendant corporation or any claim for benefits under the provisions of the Workman's Compensation Law, or any other facts that would affirmatively show such coverage.

Without precluding defendant's right to raise, at a subsequent time, the defense of election under the Workman's Compensation Laws, the defendant's motion to dismiss plaintiff's complaint is denied.

This 23rd day of December, 1970.

/s/ William C. O'Kelley
WILLIAM C. O'KELLEY
United States District Judge